

REMARKS

The Office Action mailed April 10, 2007, has set forth an election of species requirement, alleging that the embodiments of FIGs 2 and 3 are patentably distinct. Applicant respectfully traverses this restriction as being both improper and untimely.

First, Applicant notes that the requirement is improper. In this regard, MPEP 808.02 places a specific burden on the Examiner to justify the restriction/election requirement. In this regard, MPEP 802.02 states:

...the examiner must show by appropriate explanation one of the following:

(A) Separate classification thereof: This shows that each invention has attained recognition in the art as a separate subject for inventive effort, and also a separate field of search. Patents need not be cited to show separate classification.

(B) A separate status in the art when they are classifiable together: Even though they are classified together, each invention can be shown to have formed a separate subject for inventive effort when the examiner can show a recognition of separate inventive effort by inventors. Separate status in the art may be shown by citing patents which are evidence of such separate status, and also of a separate field of search.

(C) A different field of search: Where it is necessary to search for one of the inventions in a manner that is not likely to result in finding art pertinent to the other invention(s) (e.g., searching different classes/subclasses or electronic resources, or employing different search queries, a different field of search is shown, even though the two are classified together. The indicated different field of search must in fact be pertinent to the type of subject matter covered by the claims. Patents need not be cited to show different fields of search.

The Office Action has not satisfied these requirements. In fact, there is absolutely no discussion in the Office Action as to why the different embodiments allegedly constitute distinct species. Accordingly, the restriction is traverse on the grounds that the Examiner has not satisfied even the most minimal burden required by the MPEP.

Applicant further notes that the MPEP requires that no such election or restriction be required, when the application can be searched and examined without

undue burden on the Examiner. According to the PTO's PAIR system, the Examiner performed an initial search of this application on March 9, 2005, and an updated search was performed on March 24, 2006. Additional search strategies and notes were recorded by the Examiner on July 29, 2006 and August 3, 2006.

MPEP 904.03 requires:

It is a prerequisite to a speedy and just determination of the issues involved in the examination of an application that a careful and comprehensive search, commensurate with the limitations appearing in the most detailed claims in the case, be made in preparing the first action on the merits so that the second action on the merits can be made final or the application allowed with no further searching other than to update the original search. ***It is normally not enough that references be selected to meet only the terms of the claims alone, especially if only broad claims are presented; but the search should, insofar as possible, also cover all subject matter which the examiner reasonably anticipates might be incorporated into applicant's amendment.***

As the Examiner has already performed an initial search and several updated searches, the embodiments of Figures 2 and 3 should have already been fully search. Therefore, consideration of both of these embodiments at this stage of the proceedings certainly imposes no undue burden on the Examiner.

Further still, Applicant traverses the election requirement as being untimely. MPEP 808.01(a) states that "Election of species may be required prior to a search on the merits..." In the present application, multiple Office Action have been mailed and responded to (indeed, an RCE has already been filed in this application). To the extent that an election of species would have been appropriate in this case

For the foregoing reasons, Applicant traverses the election requirement. However, in order to comply with Applicant's duty to elect, Applicant hereby elects species I (Embodiments of Figure 2), with traverse. Claims 9-10 and 12-13 directly read on this embodiment.

CONCLUSION

In view of the foregoing, it is believed that all pending claims are in proper condition for allowance. If the Examiner believes that a telephone conference would expedite the examination of the above-identified patent application, the Examiner is invited to call the undersigned.

No fee is believed to be due in connection with this submission. If, however, any fee is believed to be due, you are hereby authorized to charge any such fee to deposit account No. 20-0778.

Respectfully submitted,

By: /Daniel R. McClure/
Daniel R. McClure
Registration No. 38,962

Thomas, Kayden, Horstemeyer & Risley, LLP
100 Galleria Pkwy, NW
Suite 1750
Atlanta, GA 30339
770-933-9500